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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO AVILA SANCHEZ,

Defendant and Appellant.

C061968

(Super. Ct. No.
93F08898)

Defendant appeals from the denial of his motion to expunge (Pen. Code, § 1203.4)¹ his conviction for committing a lewd or lascivious act upon a child (§ 288, subd. (a)). He contends the court erred in summarily denying this motion on the ground that relief under section 1203.4 is unavailable to one convicted of a violation of section 288, and asks that we remand for the court to consider his motion. We find no error and affirm the judgment (order).

¹ All further unspecified statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

In 1993, defendant was charged with one count of committing a lewd and lascivious act upon a 13-year-old family friend.

Pursuant to plea negotiations, defendant agreed to plead no contest to the charge. The minute order from the date of defendant's plea, January 10, 1994, indicates the case was certified to the superior court, an exam pursuant to section 288.1 was ordered, and the sentence was indicated in a box stamped at the bottom of the page: "No SP @ OUTSET" and "PROMISE 1 yr C.J."

At sentencing, the trial court placed defendant on probation for eight years, ordered him to serve 180 days in jail, and recommended work furlough. There is no transcript in the record of the sentencing proceeding, but the minute order and order of probation of that March 4, 1994, proceeding sets forth the conditions of probation and, after the judge's signature, the following proviso: "Sec. 1203.4 Penal Code: PROBATIONER MAY WITHDRAW PLEA OF GUILTY. [¶] At any time after the termination of the period of probation, upon completion of the requirements of Penal Code section 1203.4, you may petition the court to exercise its discretion to allow you to withdraw your plea of guilty or nolo contendere or to set aside a verdict of guilty and dismiss the accusations against you. If such relief is granted by the court, you may also petition the court for a certificate of rehabilitation and pardon upon completion of the requirements of Penal Code section 4852.01."

In 2009, defendant moved pro se to withdraw his guilty plea and dismiss the charge pursuant to section 1203.4. Alternatively, he asked that the charge be reduced from a felony to a misdemeanor, pursuant to section 17.

The probation department sent a memorandum to the trial court indicating defendant had served his jail time, and has had no further violations of law. However, it also indicated that defendant "continues to owe \$3290 of the \$4390 [in] probation fees" and he "did not satisfactorily meet the conditions of probation . . . as he continues to owe monies to the DRR." The memorandum further stated that since defendant had been convicted of a section 288 violation, he was not eligible for relief under either section 17 or section 1203.4.

The trial court denied defendant's motion, stating that defendant's conviction rendered him ineligible for relief under either section 17 or section 1203.4 "because of the nature of the charges."

DISCUSSION

Section 1203.4 provides in relevant part: "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, . . . the defendant shall, at any time after the termination of . . . probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty . . . and enter a plea of not guilty; . . . the court shall thereupon dismiss the accusations or information against the

defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense" (§ 1203.4, subd. (a).)

In 1997, the Legislature amended section 1203.4 "to make section 1203.4 relief unavailable to those convicted of certain sex offenses, including a violation of section 288." (*People v. Arata* (2007) 151 Cal.App.4th 778, 783 (*Arata*); *People v. Paredes* (2008) 160 Cal.App.4th 496, 508, rev. den. June 11, 2008.) Section 1203.4, subdivision (b) now provides that "[s]ubdivision (a) of this section does not apply to . . . any violation of . . . Section 288"

Defendant concedes that the Legislature amended section 1203.4 in 1997 and that as a result, section 1203.4 relief is no longer available for individuals convicted of violating section 288. *People v. Acuna* (2000) 77 Cal.App.4th 1056 (*Acuna*) upheld denying section 1203.4 relief to one who pled guilty to violating section 288 before the amendment to section 1203.4. The court in *Acuna* found application of the amendment did not violate the ban on ex post facto laws, because the intent of the Legislature in denying the relief was not to impose punishment; it was to enhance public safety. (*Acuna, supra*, at p. 1060.) The court in that case also rejected the contention that application of the amended statute to his case denied defendant the benefit of his plea bargain, because it found expungement was not an express provision of his plea bargain and the agreement was workable without it. (*Id.* at p. 1062.)

Here, as in *Acuna*, the trial court applied "the law as it existed at the time" defendant filed his petition, and properly denied it. (See *Acuna, supra*, 77 Cal.App.4th at p. 1061.)

To support his argument the court erred, defendant relies wholly on this court's opinion in *Arata, supra*, 151 Cal.App.4th 778, but that case does not alter our conclusion. In *Arata*, the defendant pled guilty to violating section 288 sometime prior to 1997 and the court placed him on probation. (*Arata, supra*, at p. 781.) After the Legislature amended section 1203.4, defendant moved for section 1203.4 relief, claiming he sought to enforce his plea bargain. (*Arata, supra*, at p. 781.) He contended that he was advised of the promise of section 1203.4 relief before he pled guilty, and that he relied on that promise. (*Id.* at p. 782.)

To support this argument, the defendant in *Arata* submitted two declarations. (*Arata, supra*, 151 Cal.App.4th at pp. 781-782.) His own declaration stated that he discussed his plea agreement with his trial counsel and counsel told him that if he completed probation, he would be able to withdraw his plea and have his case dismissed pursuant to section 1203.4. (*Arata, supra*, at pp. 781-782.) Trial counsel submitted a declaration averring that it was his habit and custom to discuss section 1203.4 relief with his clients and that "[t]he advisement of section 1203.4 relief appeared on the probation papers and these would have been discussed with defendant." (*Arata, supra*, at p. 782.)

After the trial court denied the motion, the defendant appealed, contending that retroactive application of the amended version of section 1203.4 to his case violated his plea bargain and his right to due process because "he entered his plea of guilty with the understanding that after successful completion of probation, he would be permitted to withdraw his plea and the court would dismiss the information." (*Arata, supra*, 151 Cal.App.4th at p. 786.) This court agreed. We found that section 1203.4 relief was an implied term of the defendant's plea bargain (*Arata, supra*, at p. 787) and that denial of relief pursuant to that statute was "significant in the context of the entire plea bargain." (*Id.* at p. 788.) We reasoned that, because "defendant's plea rested in a significant degree on the promise of eventual section 1203.4 relief, such promise must be fulfilled" even though the statute no longer offers such relief. (*Arata, supra*, at p. 788.)

Unlike the defendant in *Arata*, however, defendant here has not established that section 1203.4 relief was a significant term of his plea bargain. His plea bargain is not in the record, and thus we cannot conclude that it contains an express provision mentioning section 1203.4 relief. (See *Acuna, supra*, 77 Cal.App.4th at p. 1062 [rejecting defendant's argument that he was deprived of the benefit of his plea bargain where he "point[ed] to no express provision in his plea bargain that mentions expungement"].) Nor can we conclude that section 1203.4 relief was an implied term of his plea agreement because, in contrast to the appellant in *Arata*, defendant submitted no

evidence in connection with his petition which would support this claim. Defendant's counsel submitted no declaration averring that he discussed the promise of section 1203.4 relief with defendant, nor did defendant offer a declaration of his own stating that he was promised section 1203.4 relief and that he relied on that promise.

True, the minute order granting probation contains a reference to section 1203.4 relief. But that reference follows the recitation of the terms and conditions of probation and the court's signature. It does not suggest that the availability of section 1203.4 relief was itself a term of the plea bargain. Thus, defendant cannot demonstrate that section 1203.4 relief was "significant in the context of the entire plea bargain" (*Arata, supra*, 151 Cal.App.4th at p. 788), so as to require its availability, notwithstanding the statute's amendment.

Accordingly, we find no error in the trial court's denial of his expungement motion.

DISPOSITION

The judgment (order) is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

SIMS, J.